Before the
Federal Communications Commission
Washington DC 20554

In the Matter of Ameritech Michigan Application for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan	))))))	CC Docket No. 97-137

Comments of Time Warner Communications Holdings, Inc.

David R. Poe
Catherine P. McCarthy
LeBoeuf, Lamb, Greene
& MacRae, LLP
1875 Connecticut Avenue, NW
Suite 1200
Washington, DC 20009

Paul B. Jones, Esq.
Janis Stahlhut
Donald F. Shepheard
Time Warner Communications
Holdings, Inc.
300 First Stamford Place
Stamford, CT 06902-6732

Dated: June 10, 1997

TABLE OF CONTENTS

SUMMARY

Time Warner Communications Holdings, Inc.[1] ("TW Comm") respectfully submits these comments[2] in opposition to Ameritech Michigan's ("Ameritech") May 21, 1997 application under 47 U.S.C. § 271 seeking Federal Communications Commission ("FCC" or "Commission") authorization to provide in-region interLATA service in the State of Michigan (hereinafter "the Application"). TW Comm is an emerging facilities-based provider of local telecommunications services. As such, it is a competitor of Ameritech in the provision of local services. In addition, TW Comm maintains a carrier relationship with Ameritech to the extent that it must obtain interconnection services from Ameritech in order to provide local exchange service to its own customers. Although TW Comm does not operate in Michigan at this time, it does operate in other states in the Ameritech region and the Commission's decision in this matter will have a significant

---

[1] A wholly-owned subsidiary of Time Warner Entertainment Company, L.P.

[2] The Common Carrier Bureau solicited comments and reply comments on Ameritech Michigan's Application for Authorization under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of Michigan by Public Notice, DA 97-1072, released May 21, 1997.

effect on those operations, as well as on TW Comm's eventual ability to enter the Michigan market.

Ameritech's Application must fail for three reasons. First, Ameritech fails to satisfy Section 271(c)(2)(B)'s Competitive Checklist. Section 271(d)(3)(A) requires a BOC to have fully implemented the competitive checklist in (c)(2)(B) with respect to access and interconnection that it provides pursuant to Section 271(c)(1)(A). The justness and reasonableness, and/or discriminatory nature of interconnection rates cannot be determined until the Eighth Circuit's judicial review process[3] has been completed with respect to the Commission's August 8, 1996 Interconnection Order.[4] In addition, Ameritech's failure to comply with the Competitive Checklist is based far more than on a theoretical legal argument regarding the appeal pending at the Eighth Circuit. Ameritech has engaged in non-complying conduct and has been found to have failed key checklist items by state commissions. Most significantly,

---

[3] Iowa Util. Bd. v. FCC, No. 96-332 and consolidated cases (8th Cir.).

[4] In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (released August 8, 1996).

Ameritech's operations support systems interfaces are inadequate.

Second, Ameritech fails to demonstrate adequately that competitors currently offer service to both residential and business customers on a facilities-basis as required by Section 271(c)(1)(A). Ameritech does not meet the burden of proof because the Application does not demonstrate that Ameritech's competitors in Michigan actually provide the requisite local exchange service to both residential and business customers "predominantly" over their own facilities. In addition, Ameritech misinterprets Section 271(c)(1)(A) in order to satisfy Track A's requirements. Specifically, Ameritech argues that the provision of service through the resale of unbundled network elements should be characterized as "facilities-based" for purposes of Section 271.

The Telecommunications Act of 1996's[5] ("1996 Act") legislative history indicates that Congress intended to encourage investment in actual facilities when it included the "facilities" language in Section 271(c)(1)(A). It is impossible to reconcile with that legislative history Ameritech's argument that the real

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

value added would not be new networks or facilities but would simply be marketing and software additions. To support its flawed interpretation of the "facilities-based" language in Section 271(c)(1)(A), Ameritech relies on a recent Commission interpretation of easily distinguishable language found in Section 214(e)(1)(A). Significantly, however, Section 214 is concerned with cost recovery and ensuring that customers receive service. Therefore, it would not be wholly inconsistent with the goals of Section 214 to consider unbundled network elements to be a reseller's own facilities. In stark contrast, the objective of Section 271 is to promote facilities-based competition and progress towards that goal can only be measured when such facilities are actually built. Accordingly, it would be inconsistent with the goals of Section 271 to consider unbundled network elements to qualify as a reseller's "own facilities".

Third, FCC grant of the Application is not in the public interest, as required by Section 271. Although there are undoubtedly benefits to consumers to be gained from making the interLATA interexchange market in Michigan even more competitive through Ameritech's entry, the possible detriments to local competition from Commission action that is not well-considered

far outweigh those minor competitive benefits. Accordingly, any action on the Application must be premised on a long-term view of the 1996 Act and its underlying policies. In this instance, substantial operational local competition in Michigan does not exist and accordingly, the Application fails to demonstrate that the local market in Michigan has been irreversibly opened to competition.

Federal Communications Commission
Washington DC 20554

In the Matter of Ameritech Michigan Application for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of Michigan	))))))	**CC Docket No. 97-137**

Comments of Time Warner Communications Holdings, Inc.

INTRODUCTION

Time Warner Communications Holdings, Inc.[1] ("TW Comm") respectfully submits these comments[2] in opposition to Ameritech Michigan's ("Ameritech's") May 21, 1997 application under 47 U.S.C. § 271 seeking Federal Communications Commission ("FCC" or "Commission") authorization to provide in-region interLATA service in the State of Michigan (hereinafter "the Application").

---

[1] A wholly-owned subsidiary of Time Warner Entertainment Company, L.P.

[2] The Common Carrier Bureau solicited comments and reply comments on Ameritech Michigan's Application for Authorization under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of Michigan by Public Notice, DA 97-1072, released May 21, 1997.

INTEREST AND PERSPECTIVE OF TW COMM

TW Comm is an emerging facilities-based provider of local telecommunications services. As such, it is a competitor of Ameritech in the provision of local services. In addition, TW Comm maintains a carrier relationship with Ameritech to the extent that it must obtain interconnection services from Ameritech in order to provide local exchange service to its own customers. Although TW Comm does not operate in Michigan at this time, it does operate in other states in the Ameritech region and the Commission's decision in this matter will have a significant effect on those operations, as well as on TW Comm's eventual ability to enter the Michigan market.

Ameritech has adopted a unified structure for its operations in the five states in which it operates, with policies and practices in one state replicated in others. State-level Ameritech operating companies are little more than the local implementation of decisions made corporately in Chicago. Indeed, the operating systems support for the five state region serves all five Ameritech operating companies as though situated in one. This structure is not perverse or illegal. It does indicate, however, that favorable action on the Ameritech Michigan Section

271 application will have a region-wide domino-effect. This is the camel's nose under the edge of the tent.

Without its own experience as a competitor in Michigan, TW Comm cannot comment on Ameritech Michigan's conduct on the basis of first-hand knowledge. However, TW Comm has followed with interest the specifics of competition within that jurisdiction. Furthermore, it is apparent that Ameritech does not claim that it has lost substantial market share in the provision of local services in Michigan or that customers, either residential or business, have a realistic choice in the facilities used to provide them with local telephone service. Ameritech's claims for Section 271 relief essentially boil down to assertions that (1) it has "opened the door" to competition through the various interconnection arrangements that it has entered into and (2) the statutory tests for Section 271 relief do not require anything more. These assertions are grossly flawed because they misperceive the statute and the nature of marketplace change it requires before incumbent Bell Operating Companies ("BOCs") may be permitted into interLATA markets.

Any evaluation of whether a BOC has satisfied the criteria of Section 271 is crucial because once Section 271

authority is granted, it will be difficult to revoke.[3] Ameritech's Application must fail such an evaluation for the following three reasons: (1) Ameritech fails to satisfy Section 271(c)(2)(B)'s Competitive Checklist; (2) Ameritech fails to demonstrate adequately that competitors currently offer service to both residential and business customers on a facilities-basis as required by Section 271(c)(1)(A); and (3) FCC grant of the request will not be in the public interest.

ARGUMENT

I. Ameritech's Application Fails to Satisfy the Competitive Checklist.

In support of the Application, Ameritech states that it satisfies the competitive checklist in Section 271(c)(2)(B) "by providing each of the checklist items to its Section 271(c)(1)(A) competitors . . . at rates and on terms and conditions that comply with the Act."[4] However, the pendency of the Eighth

[3] The need for such revocation may be more than a remote possibility, particularly if the Eighth Circuit's decision changes the required analysis under Section 271.

[4] Brief in Support of Application by Ameritech Michigan For Provision of In-Region InterLATA Services in Michigan, p. 15 (emphasis added)(hereinafter "Ameritech Brief").

Circuit appeal, and its accompanying stay[5], preclude the development of permanent interconnection rates that are one of the prescribed circumstances. Without permanent interconnection rates, it is impossible for any carrier - including Ameritech - to meet the prerequisites to local competition required by a plain reading of the relevant statutory provision.

Pursuant to Section 271's Competitive Checklist, interconnection must be provided "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[6] Section 251(c)(2) requires that interconnection be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ."[7]

The justness, reasonableness, and/or discriminatory nature of these rates for Section 271 purposes cannot be determined until the judicial review process has been completed with respect to the Commission's August 8, 1996 Interconnection

---

[5] Iowa Util. Bd. v. FCC, No. 96-332 and consolidated cases (8th Cir. October 15, 1996).

[6] 47 U.S.C. § 271(c)(2)(B)(i).

[7] 47 U.S.C. § 251(c)(2)(D).

Order.[8] In that proceeding, now before the Eighth Circuit Court of Appeals, the court stayed the national pricing standards for local service elements established in the Interconnection Order. Specifically, the court stayed the FCC's mandate that a state commission rely on the total element long-run incremental cost ("TELRIC") methodology to determine the rates for competitive providers' use of incumbent local exchange carriers' ("ILECs'") facilities as well as the Commission's requirement that a state commission rely on the FCC's proxy rates if it chooses not to rely on the TELRIC methodology to set rates.

This is not to suggest, however, that the effect of the Eighth Circuit's stay has been to halt all implementation of the Telecommunications Act of 1996 (hereinafter "1996 Act").[9] Certainly, the negotiations and arbitrations contemplated by Sections 251 and 252 of the Act are going forward, as the Eighth Circuit itself recognized to be appropriate. The agreements either voluntarily entered into or forged through the arbitration

---

[8] In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (released August 8, 1996).

[9] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

process can and should be made effective. Among other things, the Commission should also consider how to enforce the most favored nations clauses in interconnection agreements and related contracts.[10] Further, if the agreements upon which the Commission relied to grant Section 271 authority are amended, the Commission should consider whether the BOC must resubmit those agreements for further Commission review. The uncertainty regarding the ultimate structure of interconnection arrangements, particularly the unbundled element pricing rules, makes the process of implementing Section 271 much more complex because measuring whether the public interest in competitive markets has been adequately provided for through interconnection arrangements - the essence of Section 271 implementation - becomes far more intricate than even Congress imagined when the statute was

---

[10] The Commission could clarify whether the preferred route for resolving disputes regarding the most favored nations clauses in interconnection agreements and related contracts is through a contract dispute or whether it might be best to submit such disputes to an FCC or a state public utility commission complaint process. Significantly, however, recommendations regarding the resolution of such disputes is yet another subject which the Commission is unable to address other than on a temporary basis at this time. Put simply, the pendency of the Eighth Circuit appeal, and its accompanying stay, make it difficult for the Commission to reach conclusions regarding jurisdiction over such disputes.

passed.

As the Commission emphasized in its recent order on Non-Accounting Safeguards,[11] the statute's requirement that BOCs comply with Section 271(c)(2)(B)'s Competitive Checklist before it may provide in-region interLATA service is central to achieving the competitive goals of the 1996 Act:

> [T]he statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the existing interexchange carriers could enjoy an advantage from being the first to enter the other's market.[12]

Thus, the uncertainty related to the Eighth Circuit's decision regarding the Interconnection Order, and any subsequent review, make it extraordinarily difficult for the Commission to reach definitive determinations regarding satisfaction of the Competitive Checklist set forth in Section 271(c)(2)(B). The pricing elements at issue in that proceeding must be an integral

---

[11] In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, para. 8 (Dec. 24, 1996).

[12] Id.

part of any analysis regarding how the checklist should be applied.

Even if the Commission concludes that the pricing elements at issue in the Eighth Circuit proceeding are not an integral part of any analysis regarding how the checklist should be applied, Ameritech's failure to comply with the Competitive Checklist is based far more than on a theoretical legal argument. Ameritech has engaged in non-complying conduct and has been found to have failed in key checklist items by at least two state commissions.

The Track B filings of a "statement of terms and conditions that [Ameritech] generally offers to provide such access and interconnection" ("SGAT") by Ameritech in Michigan and Wisconsin have been rejected. As recently as May 29, 1997, the Wisconsin Public Service Commission not only rejected the Ameritech SGAT but listed very specific modifications which must be made before Ameritech may refile.[13] The Michigan Public Service Commission also found on June 5, 1997 that Ameritech's

---

[13] In Re Matters Relating to the Satisfaction of Conditions Offering InterLATA Service (Wisconsin Bell d/b/a Ameritech Wisconsin), WPSC Case No. 6720-TI-120 (Finding of Fact, Conclusions of Law, Second Order dated May 29, 1997).

SGAT required rejection.[14]

As the Department of Justice ("DOJ") emphasized in its evaluation of SBC Communications Inc.'s ("SBC's") request for Section 271 authority in Oklahoma, "a BOC is `providing' an item, for purposes of checklist compliance, if the item is available both as a legal and practical matter . . . ."[15] Ameritech's operations support system ("OSS") interfaces fail to satisfy even the standards that Ameritech recommends that the Commission adopt and have been found inadequate by state public utility commissions as discussed below. Ameritech's Application states that for its OSS interfaces, "operational readiness is properly defined as whether those interfaces have undergone sufficient testing or use to provide reasonable assurance that requesting carriers can obtain timely access to the OSS functions needed to enter the marketplace and successfully service end users at

---

[14] In the Matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the Telecommunications Act of 1996, MPSC Case No. U-11104 (issued June 5, 1997).

[15] Evaluation of the United States Department of Justice, In re Application of SBC Communications Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121, p. 23 (May 16, 1997)(emphasis added)(hereinafter "DOJ Comments in SBC Section 271 Proceeding").

anticipated demand levels."[16] To the contrary, Ameritech's OSS compliance has been found to be inadequate by the Wisconsin Public Service Commission as well as by an Illinois Commerce Commission's hearing examiner's proposed order.[17] Since the Ameritech carrier customer service center in Milwaukee serves the entire five-state region, including Michigan, Ameritech's assertion that its OSS interfaces "clearly meet this standard" is not credible. In fact, Ameritech Michigan is without a satisfactory OSS. Put simply, requesting carriers access to the requisite OSS functions is simply not available to competitors to the extent necessary to service end users successfully.

In addition, the Public Utilities Commission of Ohio ("PUCO") recently found that Ameritech discriminated in favor of its cable affiliate, New Media, in attachments to poles,[18] contrary to Section 271(c)(2)(B). Not only has Ameritech

---

[16] Ameritech Brief at 28.

[17] In Re Investigation Concerning Illinois Bel Telephone Company's Compliance with § 271c of the Telecommunications Act of 1996, ICC Case No. 96-0404 (Hearing Examiner Proposed Order dated March 6, 1997).

[18] In Re Ohio Cable Telecommunications Association, et al. v. Ameritech Ohio, PUCO Case No. 96-1027-TP-CSS (Opinion and Order dated April 17, 1997; Entry on Rehearing dated June 5, 1997).

discriminated in its treatment of its cable affiliate, but the Michigan Cable Telecommunications Association has filed a complaint and requested investigation of impermissible cross subsidies from local telephone rates to Ameritech New Media.[19] It would be reasonable to expect similar cross-subsidy cases throughout the region once certain marketing efforts (including, for example, "Americhecks") are deployed throughout the region.

II. The Application Fails to Satisfy Section 271(c)(1)(A)'s Requirement that Competitors Offer Residential and Business Services "predominantly over their own telephone exchange facilities . . . ."

A. Ameritech Fails to Satisfy the Burden of Proof that its Competitors in Michigan Actually Provide the Requisite Local Exchange Service in the Manner Required by the Statute.

Section 271(c)(1)(A), Track A, mandates that the Commission may not grant Section 271 authority until a BOC conclusively demonstrates that others are offering competing service "predominantly over their own telephone exchange service facilities . . ."[20] Thus, in order to grant Ameritech the

---

[19] In Re Michigan Cable Telecommunications Association et al. v. Ameritech Michigan For Violation of the Michigan Telecommunications Act and Application For Investigation Under the Michigan Telecommunications Act and the Michigan Consumer Protection Act, MPSC Case No. U-11412 (filed May 23, 1997).

[20] 47 U.S.C. § 271(c)(1)(A).

requested authority, the Commission is required to give adequate consideration to Ameritech's demonstrations of what conditions, and to what degree, Ameritech's competitors' use of their own facilities constitutes "predominantly". As the proponent of agency action, Ameritech has the burden of proof under a preponderance of the evidence standard, unless otherwise provided by statute.[21] Absent a showing of actual customer choice, Ameritech, the proponent of agency action in this instance under Section 271, fails to meet its burden of proof.

In its attempt to satisfy its burden of proof in this proceeding - to demonstrate that operational facilities-based competition for business and residential subscribers as required by Track A actually exists in Michigan - Ameritech relies almost exclusively on Brooks Fiber Communications of Michigan, Inc.'s ("Brooks Fiber's") provision of residential service in

---

[21] See, e.g., 5 U.S.C. §556(d); Steadman v. Sec. Exch. Cmm'n., 450 U.S. 91 (1981). The FCC has recognized that the allocation of the burden of proof defaults to the proponent of the proceeding when Congress does not specify otherwise. General Plumbing Corp. v. New York Tel. Co. and MCI Telecommun. Corp., 11 FCC Rcd. 11799 (1996)(citing Maine v. U.S. Dept. of Labor, 669 F.2d 827, 829 (1st Cir. 1982)).

Michigan.[22] In fact, the Application concedes that although MFS Intelenet of Michigan, Inc. ("MFS") and TCG Detroit ("TCG") are certified by the Michigan Public Service Commission to serve both residential and business customers, Ameritech is "unaware" of whether any Michigan customers of MFS or TCG subscribe to residential service. The fact that these entities hold themselves out to furnish such service is not relevant to a determination of whether they are currently facilities-based providers.

Assuming for the sake of argument alone that Ameritech has demonstrated that Brooks Fiber provides the requisite services to residential customers, the Application nonetheless fails to meet the 1996 Act requirement that Brooks Fiber is providing service to residential customers on a facilities-basis. Although the Application enumerates Brooks Fiber's facilities, it does not demonstrate definitively that these facilities are actually used, in whole or in part, to provide service to residential customers.[23] Thus, Ameritech fails to demonstrate

---

[22] Ameritech Brief at 7.

[23] Ameritech Brief at 10. For purposes of Section 271(c)(1)(A), TW Comm urges the Commission to interpret the 1996 Act as requiring the BOC to demonstrate the existence of a

that actual, rather than theoretical, competition for business and residential local exchange services exists, and thus is deficient on its face.

B. Ameritech Misinterprets Section 271(c)(1)(A) in Order to Satisfy Track A's Requirements.

Perhaps because it is impossible for Ameritech to satisfy Track A's "facilities-based" requirement as intended by Congress, Ameritech undertakes to interpret the term "facilities-based" broadly in an unsuccessful attempt to include the services that its competitors may currently provide within that definition. Ameritech's expansive interpretation of facilities-based threatens to debilitate Section 271(c)(1)(A), thereby

---

competitor providing local exchange services to both business and residential customers and that service to both classes of customers is provided "predominantly" over the competitor's own facilities. Otherwise, it is unlikely that residential customers will have a real choice and instead, would be offered a choice of the "same old service" but with value added marketing and software options. Although TW Comm generally supports the DOJ's comments submitted in SBC Communications Inc.'s Section 271 proceeding, it opposes the DOJ's statement that for these purposes, "it does not matter whether the competitor reaches one class of customers -- e.g., residential -- only through resale." TW Comm recommends that the Commission not adopt the DOJ's analysis of this issue. See Addendum to the Evaluation of the United States Department of Justice, In re Application of SBC Communications Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121, p. 3 (May 21, 1997).

undermining the competitive goals of the 1996 Act.

Specifically, Ameritech argues that the provision of service through the resale of unbundled network elements should be characterized as "facilities-based" for purposes of Section 271. Relying on its own interpretation, Ameritech distinguishes between resellers that are providing service through unbundled network elements and "pure" resellers.[24] Ameritech makes this distinction in order to characterize the services that Brooks Fiber is providing in Michigan as "facilities-based". As shown below, this contention is not worthy of belief.

To support its flawed interpretation of the "facilities-based" language in Section 271(c)(1)(A), Ameritech relies on a recent Commission interpretation of easily distinguishable language found in Section 214(e)(1)(A). In the Universal Service Proceeding, the Commission interpreted the term "facilities" in Section 214(e)(1)(A) to include the use by a competitor of unbundled network elements provided by an

[24] For purposes of this pleading, "pure" resale services are defined as services provided exclusively by reselling the services of other carriers.

incumbent.[25] However, as shown below, it does not make sense to adopt an identical interpretation for Section 271.

The two sections are intended to meet significantly different goals (Section 214 is intended to ensure that customers obtain telecommunications services and Section 271 is intended to ensure that customers have a meaningful choice of service provider).

Section 214(e)(1)(A) provides that in order to be eligible for universal service support, a common carrier must offer the services at issue "either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)."[26] In contrast, Section 271(c)(1)(A)'s use of the term facilities is more precise,

> For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange

---

[25] In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, paras. 150-180 (May 8, 1997).

[26] 47 U.S.C. § 214(e)(1)(A)(emphasis added).

service facilities . . . .[27]

Telephone exchange service facilities are a lesser subset of "its own facilities" and accordingly, the statutory provisions differ on their face. Ameritech's recommendation that the Commission treat "facilities" as identical to "local exchange facilities" must be rejected as being contrary to the normal rules of statutory interpretation.

The 1996 Act's legislative history indicates that Congress intended to encourage investment in facilities when it included the "facilities" language in Section 271(c)(1)(A). This investment in facilities is intended to foster customer choice. The legislative history does not support Ameritech's interpretation that "own facilities" for purposes of Section 271(c)(1)(A) includes the facilities to which a competing carrier has title as well as the facilities that a competing carrier obtains from a BOC as unbundled network elements.[28]

In contrast to the interpretation of "own facilities" that Ameritech endorses in the Application, the legislative history indicates that Congress intended to define a competitor

---

[27] 47 U.S.C. § 271(c)(1)(A)(emphasis added).

[28] Ameritech Brief at 14.